The Case Against Dog Breed Discrimination by Homeowners' Insurance Companies

Larry Cunningham

The Case Against Dog Breed Discrimination by Homeowners' Insurance Companies

 Connecticut Insurance Law Journal

*1 THE CASE AGAINST DOG BREED DISCRIMINATION BY HOMEOWNERS' INSURANCE COMPANIES

Larry Cunningham [FNa1]

*3 Introduction

  In the Spring of 2003, I moved from Virginia to Texas to begin work as a tenure-track faculty member at Texas Tech University School of Law. I brought my two dogs with me: Saffy (a 4-year-old mixed breed whose parents were a fluffy red Chow Chow and a big black Labrador Retriever) and Semona (a 2-year-old Rottweiler). Neither Semona nor Saffy has ever bitten anyone. Neither has shown any aggressive tendencies. Both are extremely playful and friendly animals.

  After I placed a bid on a house in Lubbock, Texas, I began the search for homeowners' insurance-a process which I thought would be straightforward and easy. Much to my surprise, dozens of insurance companies denied my application outright. The reason? Semona is a Rottweiler and Saffy is half-Chow. Rottweilers and Chow Chows are on the "blacklist" of dog breeds. Some insurance companies believe they, along with Pit Bulls, Huskies, Doberman Pinchers, and other specified breeds, are more likely to bite humans and, in turn, cause liability claims to be brought against their owners. Even mixed breeds, like my half-Chow Saffy, are blacklisted. This practice is known by many dog owners as "breed discrimination."

  Thankfully, the story ended happily for my dogs and me. After weeks of calling nearly every insurance agent in Lubbock, I was able to obtain insurance through the Texas Farm Bureau, an organization that advocates for farmers and farming issues. [FN1] Had it not been for the Farm Bureau, I would have found myself on the horns of a horrible dilemma: whether to buy a home or give up my dogs. Anyone who knows me can confirm that this dilemma would have been easy to resolve; I would have chosen my furry family members over home ownership. [FN2] Sadly, however, many *4 Americans are finding themselves in similar positions and are opting to give up their dogs to animal shelters. [FN3]

  Breed discrimination by insurance companies is on the rise in the United States. Insurers are refusing to write homeowners' policies for people who own breeds that the insurance industry considers to be dangerous. Their decisions are based solely on the breed of the animal, notthe individual characteristics of the particular dog. Dog bites are certainly a public health concern. However, the insurance industry's approach to the problem is based on faulty assumptions and improper use of dog bite statistics. The insurance industry has prejudged entire breeds of dogs as being "too risky," instead of taking a more reasonable dog-to-dog approach to risk assessment.

Major veterinary and breed registry organizations have strongly opposed breed discrimination in insurance. Authors of scientific studies on dog bites have even argued against the use of their data to support breed-based decision-making by insurers and legislatures. Dog owners across the country have spoken out about the horrible choice they have been forced to make between obtaining insurance and keeping their dogs.

There has existed a historic tension between risk classification and social policy. Classification and insurability decisions are usually "actuarially justified"-that is, the insurance company has identified a statistical correlation between a characteristic and increased risk. Actuarial justification is frequently cited by insurers as a reason to avoid social regulation. Insurers exist to make a profit for their shareholders. They do so by minimizing risk which, in turn, minimizes claims paid out.

Actuarial justification is only the first step in determining the social propriety of a proposed underwriting mechanism. Social utility of the risky conduct must also be considered. Statutes across the United States are replete with examples of legislatures overruling actuarially justified practices in favor of competing social policies. "Red-lining" is a classic example. Actuaries identified statistical correlations between living in certain neighborhoods and increased risk for claims against homeowners' policies. As a result, insurance companies began to refuse to write policies in these high-risk neighborhoods. The neighborhoods in question were often economically depressed and occupied by members of racial or ethnic minorities. Legislatures and courts stepped in to prohibit red-lining, despite the actuarial justification for the practice. [FN4]

*5 Breed discrimination is a different animal altogether. Even without considering the high social utility of pet ownership, insurers have been unable to demonstrate an actuarial justification for discriminating based on breed. As the multidisciplinary Task Force on Canine Aggression and Human-Canine Interactions concluded, "[d]og bite statistics are not really statistics, and they do not give an accurate picture of dogs that bite." [FN5] The popular notion that Pit Bulls and Rottweilers are inherently more likely to bite is simply not supported by the available statistics.

When the social utility of pets is added to the equation, breed discrimination becomes even more unreasonable. Dogs and other domesticated animals provide immeasurable joy and happiness to the families that own them. Even some components of the legal system itself have evolved to recognize pets as being more than mere chattel. [FN6] In addition, the failure to obtain homeowners' insurance is a death knell for homeownership-no insurance, no mortgage; no mortgage, no house.

My argument is quite simple: Decisions regarding the provision, rating, termination, or renewal of a homeowners' insurance policy should not be based on ownership or possession of a particular breed of dog unless there is evidence of dog-specific risk. Insurers would concededly be actuarially justified in charging higher premiums or declining coverage for people who own dogs that have unjustly bitten in the past. After all, the best predictor of future behavior is past behavior. Breed discrimination, as it currently stands, is not actuarially justified because scientists have not been able to accurately determine whether certain breeds are inherently more dangerous, or instead whether a breed's high population is making it appear that the breed is more dangerous.

The consequences of breed discrimination could not be greater. Homeowners' insurance is the gatekeeper to homeownership. Without homeowners' insurance, a buyer cannot get a mortgage. For most Americans, if a person cannot obtain a mortgage, he cannot buy a home.

In Part I of this article, I will give an overview of the problem: dog breed discrimination by insurers, as well as a related problem of breed-specific legislation by some states. In Part II, I will analyze the major scientific studies on dog bites, showing that no one has adequately proven *6 that some breeds are more inherently dangerous than others. In Part III, I will show that breed discrimination and breed-specific legislation are

opposed by most veterinary and animal groups. Part IV will demonstrate that insurers have been ignoring the unique and special role that pets play in millions of American homes. I draw upon not only the profoundly personal arguments advanced by myself and others, but also the way in which the law itself is evolving by recognizing pets as more than mere property. Part V shows how the insurance industry is a highly regulated industry which subjects itself to legislative control where, as here, the public is being harmed by underwriting decisions not driven by actuarial justification. I will also offer a number of alternatives to breed discrimination.

I. Dog Breed Discrimination

  Breed discrimination in insurance is a recent phenomenon that was preceded by the enactment of "breed-specific legislation" ("BSL") by some state legislatures and municipalities. Both breed discrimination and BSL are a perceived response to highly publicized attacks by certain breeds, particularly Pit Bulls.

A. Highly Publicized Attacks by Pit Bulls

  In the 1980s, there were a number of high-profile attacks on humans by Pit Bulls. These attacks led to a near-hysterical reaction by members of the communities that were affected by the attacks and by the legislators who represented them.

  In March of 1984, Pit Bulls attacked Angie Hands, a 9-year-old girl in Tijeras, New Mexico. [FN7] The dogs bit her right leg to the bone, ripped flesh from her arms, and tore her ear in half. [FN8] The child survived but had to undergo years of reconstructive surgery. [FN9] She had been attacked by her uncle's four Pit Bulls in between her bus stop and her home. [FN10] The small community of Tijeras-located outside of Albuquerque-responded with an outright ban on Pit Bull ownership. [FN11] Dog owners challenged the law in *7 court, but the law was upheld as a constitutional exercise of the town's police power. [FN12]

  The attack on Angie Hands followed a number of other Pit Bull attacks around the country. A 4-year-old girl was killed in Oregon City when she fell into a yard where a Pit Bull was chained. [FN13] Two Pit Bulls mutilated their owner in Edgemere, Maryland. [FN14] A recent, widely-publicized attack in San Francisco has also brought the issue of aggressive dogs to the forefront of public attention. In January 2001, Diana Whipple was mauled to death by two Presa Canario dogs. The dogs were owned by a pair of lawyers. Evidence at the owners' murder trials showed that the dogs had tried to attack other people and animals in the past. Both defendants were convicted and served prison time. [FN15] A subsequent civil lawsuit brought by Ms. Whipple's mother was settled out-of-court. [FN16]

B. The Reaction of Some State Legislatures: "Breed-Specific Legislation"

  Highly-publicized Pit Bull attacks in the 1980s led to "knee-jerk reactions" by many communities. [FN17] Attacks led to editorials, which led to public outrage, which led to swift and spontaneous legislative action that was based on neither good science nor good law. "Breed-specific legislation" ("BSL") began to emerge in the 1980s and early 1990s. These laws targeted specific breeds for regulation or, in some cases, outright bans. BSL is on the rise in the United States. States and municipalities across the country have considered-and in some cases, enacted-breed-specific legislation designed to protect the public against dog bites. [FN18] Commonly, *8 these statutes and ordinances have banned, or placed restrictions on, Pit Bulls, Rottweilers, Doberman Pinschers, Chow Chows, German Shepherds, and Shar-Peis. [FN19]

  Ohio has aggressively targeted Pit Bulls for regulation. Ohio law declares any dog that "[b]elongs to a breed that is commonly known as a Pit Bull dog" [FN20] is automatically a "vicious dog." [FN21] "Vicious dogs" must be penned or tied up when on their owners' premises. [FN22] If off-premises, they must be tethered,

caged, or muzzled. [FN23] Owners must obtain liability insurance to provide coverage in the event of a bite. [FN24]

BSL has also occurred at the local municipal level. Denver, Colorado, passed an outright ban on the ownership, possession, keeping, control, maintenance, harboring, transportation, or sale of Pit Bulls. [FN25] A "Pit Bull" is defined as an American Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, or any dog displaying the majority of physical traits of one of those breeds. [FN26] This ordinance is in addition to Denver's "dangerous dog" ordinance which regulates "[a]ny dog with a known propensity or disposition to attack unprovoked, to cause injury or to otherwise endanger the safety of humans or other domestic animals." [FN27] "Dangerous dogs" must be confined while at home and must be leashed and muzzled while traveling. [FN28]

Not all states have followed the BSL trend. Some legislatures have prohibited BSL enacted by municipalities. Florida enacted a statute that permits localities to regulate dogs "provided that no such regulation is specific to breed." [FN29] Some legislators have attempted, without success, to repeal this anti-BSL statute in response to several highly-publicized attacks. [FN30] Minnesota also has the following prohibition against BSL: "A *9 statutory or home rule charter city, or a county, may not adopt an ordinance regulating dangerous or potentially dangerous dogs based solely on the specific breed of the dog." [FN31]

Court challenges to BSL have been largely unsuccessful. [FN32] Opponents of BSL have brought lawsuits claiming the legislation is unconstitutional because it violates due process (substantive and procedural), the Takings Clause, [FN33] equal protection, and the vagueness doctrine. [FN34] Plaintiffs have challenged BSL on due process grounds by arguing that there was no "rational relationship" to a legitimate legislative goal or purpose. [FN35] Courts have ruled that BSL is a rational response to a perceived problem of dog bites by certain breeds. [FN36] They have also rejected plaintiffs' arguments that the statutes and ordinances do not provide dog owners with sufficient notice and an opportunity to be heard, which are the requirements for procedural due process. [FN37] The Tijeras ordinance, for example, provides that a Pit Bull may be destroyed by the village only after a hearing to determine whether the dog is, in fact, a Pit Bull. [FN38] Plaintiffs have also contended that BSL amounts to a taking without just compensation. Courts have rejected this argument, noting that personal property is subject to *10 regulation under the police power of a state. [FN39] Challenges based on vagueness have argued that identifying a dog's breed is difficult. [FN40] Most courts have found BSL to be sufficiently specific to enable a reasonable dog owner to determine if his or her dog is covered by the particular statute. [FN41] Plaintiffs have also alleged that BSL violates equal protection by singling out Pit Bulls but not other breeds. [FN42] Courts have noted that Pit Bull ownership is not a "suspect classification" and therefore BSL need only have some reasonable basis to be constitutional. Courts have concluded that sufficient evidence exists to support a finding that Pit Bulls can be regulated by legislatures and municipalities. [FN43]

One significant decision found BSL to be unconstitutional. In American Dog Owners Assoc., Inc. v. City of Lynn, [FN44] the Massachusetts Supreme Judicial Court upheld a trial court's finding that the City of Lynn's attempt to regulate Pit Bulls was unconstitutional. [FN45] The Court noted that it is particularly problematic to determine a dog's breed. The Court held, "[t]here is no scientific means, by blood, enzyme, or otherwise, to determine whether a dog belongs to a particular breed, regardless of whether 'breed' is used in a formal sense or not." [FN46] The Court upheld the trial court's finding that animal control officers had no real standards to identify Pit Bulls, in part because they had no training in breed identification. [FN47] The ordinance included a ban on mixed-breed dogs that contained "any mixture" of Pit Bull. [FN48] This provision was likewise found to be unconstitutional since it is scientifically "impossible to ascertain" whether a dog is part Pit Bull. [FN49] The ordinance was also unconstitutional because it tried to define "Pit Bull" as including any breed where "common understanding and usage" dictated that the dog was, in fact, a Pit Bull. [FN50] *11 The combination of these facts led the court to conclude that the statute was too vague to pass constitutional muster. [FN51]

C. The Reaction of Insurers: "Breed Discrimination"

While some communities and states have responded to dog bites with breed-specific legislation designed to regulate or outlaw certain breeds, insurance companies have also reacted to the problem of dog bites in a breed-specific manner. Dubbed "breed discrimination" by dog owners, insurance companies have started making coverage and renewal decisions based on one's ownership of certain breeds of dog.

1. A Rise in Breed Discrimination

During 2003 and 2004, the media brought breed discrimination to light. The CBS Evening News with Dan Rather aired a story in June of 2003 that featured a family that had difficulty obtaining insurance because they owned a Dalmatian. [FN52] The report stated, "[a]nimal lovers have a term for what the insurance company did. They call it 'breed discrimination'-arbitrarily punishing all dogs of certain breeds because some are vicious." [FN53] In the months that followed, several newspaper stories discussed the prevalence of breed discrimination and documented the effects this practice has had on families. [FN54] These news reports replicate the experience I had in *12 trying to get homeowners' insurance. Multiple insurers denied coverage because of the dogs I owned. I literally could not find a carrier in the Lubbock market willing to write a policy for me until I stumbled upon the Farm Bureau on the advice of one insurance broker who sympathized with my plight.

The practice of breed discrimination produces absurd results. Consider the case of Chris and Norm Craanen of San Antonio, Texas. [FN55] They own a 12- year-old dog named Bukarus. He is a Rottweiler, a breed often targeted for discrimination by insurance companies. Yet, Bukarus does not pose much of a threat: he is deaf, partially blind, and has arthritis. [FN56] Despite his bite-free history, his owners lost their homeowners' insurance. [FN57]

*13 Some of the most well-known insurers are engaging in breed discrimination. [FN58] Some insurers have outright bans on specific breeds, [FN59] while others take a more realistic and logical dog-by-dog approach. These decisions are predicated on insurers' assessment of relative risk. [FN60] The "usual suspects" for breed discrimination are Pit Bulls, Rottweilers, German Shepherds, Doberman Pinschers, Chow Chows, Wolf hybrids, and Presa Canarios. [FN61]

The Humane Society of the United States has documented an increase in the number of people being denied insurance because they own certain breeds of dog. [FN62] As a result, the Society has started collecting data through the Internet, in the hopes of eventually convincing the insurance industry that there are alternatives to the current practice and that it must stop. [FN63] To achieve their goal, the HSUS and the American Society for Prevention of Cruelty to Animals have created a joint grassroots campaign designed to educate the insurance industry. [FN64]

2. The Insurance Industry's Defense of Breed Discrimination

Homeowners' insurance protects a policyholder in the event of financial loss. Most policies include two provisions: property damage and liability. Property damage provisions protect the policyholder in the event of fire, lightning, wind, water or hail damage, theft, and vandalism. Liability provisions protect the policyholder in the event that a claim is made against a homeowner for negligence. Liability coverage typically pays for bodily injury, medical payments, and property damage that is *14 sustained because of the negligence of the property owner. [FN65] Absent breed discrimination, most homeowners' insurance policies would cover injuries due to dog bites on the premises between the amounts of $100,000 and $300,000. [FN66] In 1995, the average policyholder paid $418 in homeowners' insurance premiums. [FN67] By 2004, the average premium climbed to $608. [FN68]

"Insurance is a business." [FN69] Insurers must make profits in order to continue in existence. [FN70] Companies survive by minimizing risk, which reduces the likelihood of claims. Some companies have decided that certain breeds of dog are simply "too much of a risk" to insure. [FN71] An industry representative claims that the issue of dog bites "is a major concern for insurers." [FN72]

The industry defends its position, in part, on a series of studies from the Centers for Disease Control ("CDC"), which the industry claims as support for the proposition that certain breeds have a propensity to bite. [FN73] As I will demonstrate in Part II, however, the industry's reliance on the CDC studies is misplaced. Even the authors of the CDC studies have stated that breed discrimination is wrong and is not supported by scientific evidence. [FN74]

The industry has also pointed to the large amount of money that has been paid out in recent years for dog bite claims. [FN75] The Insurance Information Institute ("III"), a trade group of the insurance industry, stated that in 2002, $345.5 million was paid out in dog bite liability claims, up *15 from $250 million in 1995. [FN76] The group argues that dog bite lawsuits are on the rise and juries are awarding larger claims. [FN77] They claim, therefore, the need to curtail their risk.

The industry's cost statistics are misleading, however. The III states, "[d]og bites now account for almost one quarter of all homeowner's insurance liability claims costing $345.5 million." [FN78] Some perspective is in order. For every $100 in premiums, insurers spend $77 paying claims. Of that $77, the overwhelming majority ($72, or 93.5%) is spent on paying property damage claims. Liability claims only amount to $5, or 6.5%, of total claims. [FN79] Even then, dog bites only constitute a percentage of that figure. Put into perspective, the money paid out in dog bite claims is negligible when compared to the overall amount of money paid out for other types of claims. Damage due to lightning, fire, and mold all individually account for more claims payouts than all liability claims combined. [FN80]

The insurance industry has not been consistent in the reasons for its defense of breed discrimination. One report from III's website seems to defend breed-specific responses based on the aggregate claims paid [FN81] and stories of several high-profile and tragic bites. [FN82] However, in a statement to a newsletter of veterinary medicine, the III defended breed discrimination on the basis that certain breeds cause more damage when and if they do bite. [FN83] Ultimately, a spokesperson for the III conceded, "[t]he industry isn't *16 positioned to determine which dogs should be deemed vicious. . . . [W]e're certainly not dog experts or veterinarians." [FN84] This, however, has not stopped many insurers from engaging in breed discrimination.

3. Some Exceptions to the Rule?

It appears that not all insurers have followed the breed discrimination trend. DVM reported that Nationwide Insurance changed its breed discrimination policy in October 2003. While Nationwide will now insure all dog owners, it will specifically exclude dog bites from its liability coverage. [FN85]

State Farm's national representatives have repeatedly stated that the company does not practice breed discrimination. [FN86] However, when I searched for homeowners' insurance in 2003, a State Farm agent in Lubbock refused to even take my application because of the breeds I owned.

D. Other Instances of Breed Discrimination

There are other examples where a person's ownership of a particular breed of dog can have negative consequences. Families seeking to adopt children can face roadblocks if they own dogs that belong to certain breeds. In Massachusetts, the Adoption and Foster Care Unit of the Department of Social Services will not place children in homes with certain breeds of dog. [FN87] The state relied upon data provided by the insurance

industry when it made its decision to discriminate based on breed. [FN88] Some airlines also *17 practice breed discrimination by prohibiting some dogs from flying, even though they are stored in cargo and in a closed carrier. [FN89]

II. The Lack of Scientific Evidence to Support Breed Discrimination

   Numerous scientific studies have attempted to identify the number of annual dog bites, the dogs most likely to bite, the people most likely to be bitten, and the circumstances under which bites are most likely to occur. Such studies have not reached a uniform consensus and have left us with more questions than answers. Even the studies that have attempted to report on breeds' proclivity to bite have cautioned that their research is incomplete and should not be used to justify breed discrimination by legislatures or insurers. [FN90]

A. CDC Statistics

   The U.S. Department of Health and Human Services, Centers for Disease Control and Prevention ("CDC"), commissioned a number of studies during the 1980s and 1990s to determine the scope and nature of the problem of dog bites in the United States.

1. Fatality Studies

   Four separate studies attempted to chronicle the number of fatal dog bites during the periods of 1979-1988, [FN91] 1989-1994, [FN92] 1995-1996, [FN93] and 1997-1998. [FN94] The studies were specifically limited to fatal dog attacks because fatality statistics are easier to track. [FN95] Non-fatal bites were excluded from the studies, although other scientists have attempted to use *18 emergency department reports and other sources to determine the number of non-fatal bites per year. [FN96]

   The authors combed three sets of sources in an attempt to determine the number of fatal dog bites per year. First, they searched NEXIS for news reports of dog bite-related fatalities. [FN97] Second, they used the National Center for Health Statistics' ("NCHS") single-cause mortality tapes ("SCMTs") to identify deaths where the underlying cause was listed as a dog bite. [FN98] Finally, the authors supplemented these reports with information collected by the Humane Society of the United States ("HSUS") to help identify the breed of dog involved in each incident. [FN99] From these three sources, the authors tried to piece together the number of people who died each year in the United States from dog bites.

   The authors concluded that dog bites caused approximately 7 deaths per year per 100 million people. [FN100] They discerned no identifiable trend that would indicate an increase in the incidence of fatal bites over the years of the studies. [FN101] During the first reporting period (1979-1988), approximately 70% of victims were under the age of 10. [FN102] Males, under the age of 29, were more likely than females to be victims. [FN103] These findings as to age and gender were consistent throughout the study periods.

   Many of the fatal bites of children involved horrific attacks on the very young. A 3-week-old girl was killed in her crib by the family's Chow Chow. [FN104] A 2-year-old boy in South Dakota wandered into a neighbor's yard where he was attacked and killed by two German Shepherd-wolf *19 hybrids. [FN105] The elderly were also victims of several fatal attacks. In March, 1996, two Rottweilers killed an 86-year-old Tennessee woman. One month before the assault, the dogs had attacked and injured the same woman. [FN106]

   In the twenty-year period of the CDC studies, the breed responsible for the most number of bites has changed. [FN107] From 1979-1980, Great Danes caused the most number of fatalities with three deaths for the time period. However, four breeds were tied with two deaths each: Pit Bulls, Rottweilers, Huskies, and Malamutes. [FN108] In 1981, Pit Bulls took over as the breed with the most number of fatal bites. [FN109] Pit Bulls

remained in that position until 1993 when Rottweilers began causing approximately ten fatal bites per two-year reporting period. [FN110] The last available reporting period, 1997-1998, shows that Rottweilers caused ten fatal bites per two-year period, while Pit Bulls caused six, and Saint Bernards caused three. [FN111] During the 20-year study, 90 deaths were excluded because the breed was "unavailable." [FN112]

The authors of the CDC studies acknowledged that the methods they used in their studies had a number of limitations. NEXIS, they pointed out, was not designed for scientific research. News reports would only be flagged if their text contained certain keywords. [FN113] Further, reliance on NEXIS assumes that newspapers accurately reported the breed of dog involved in a particular attack. [FN114] SCMTs have a one-to-two year lag time, which means that some fatalities may have been missed. [FN115] The authors believed that, on average, their methods only uncovered approximately 74% of dog bite related fatalities. [FN116]

Even if one accepts the CDC statistics as definitive on the subject, they have a number of other limitations in answering the question of whether *20 certain breeds are more dangerous than others. First, the studies were limited to fatal dog attacks. [FN117] Secondly, the breed of the dog could not be accurately determined in every case. [FN118] Finally, the number of fatal attacks per year is so low that it is problematic to statistically extrapolate conclusions from the data. For example, in the first two years of the study (1979-1980), Great Danes accounted for the most number of fatal bites (three). [FN119] Four breeds, however, followed closely behind with two fatal bites each (Pit Bull, German Shepherd, Husky, and Malamute). [FN120] It would be statistically questionable to conclude that Great Danes were inherently more dangerous than the other breeds, based on a net difference of only one fatality.

2. Non-Fatality Studies

The CDC fatality studies acknowledged that, while death rates for dog bites do not appear to have increased over time, [FN121] nonfatal bites were becoming more of a public health problem. [FN122] The CDC conducted a study on nonfatal dog bites in 2001. [FN123] The study used data from the National Electronic Injury Surveillance System-All Injury Program ("NEISS-AIP") to identify the number of nonfatal dog bites during the 2001 calendar year. NEISS-AIP collects data from initial visits to Emergency Departments ("EDs") across the country. [FN124] NEISS-AIP data is drawn from a nationally representative sample of NEISS hospitals. [FN125] The CDC analyzed every case where "dog bite" was listed as the external cause of injury. [FN126]

In total, NEISS-AIP data revealed that hospital EDs treated 6,106 patients for dog bite-related injuries during 2001. [FN127] Since the NEISS-AIP *21 data did not include every hospital in the nation, the authors used this data to extrapolate to the general population. [FN128] They estimated that 368,245 people were treated for dog bite-related injuries in 2001. [FN129] The highest cohort of victims was children between the ages of five and nine. [FN130] Boys, under the age of 14, were more likely than girls to be seen in EDs for dog bite-related injuries. [FN131]

The NEISS-AIP data included narratives for many of the attacks. One case involved a 4-year-old who was bitten by a dog guarding her puppies. [FN132] Another involved a 3-year-old girl who was bitten when she tried to take away a dog's food. [FN133] A 34-year-old man was bitten while trying to break up a dogfight. Some victims were bitten by their own dogs. A 27-year-old woman was bitten by her dog after he had been hit by a car and became disoriented. [FN134] A 75-year-old woman was attacked while trying to prevent her dog from biting an EMT who was attempting to put the woman in an ambulance. [FN135]

The Morbidity & Mortality report describing the study does not document the number of attacks per breed. This is likely due to the fact that the ED reports did not specify the breed of dog. An attempt to determine the

number of bites per breed would depend on victims accurately self-reporting the breed of the attacking dog. [FN136]

The study had a number of limitations. First, the authors excluded fatal dog bites. Second, the study only examined cases where the victim sought treatment in an ED. Victims may have gone to other health care providers, such as private physicians or urgent-care centers. Third, 26% of reports were missing an injury diagnosis. Many cases had limited data on the circumstances of the attack or the identity of the dog involved. [FN137] Thus, the CDC's estimates may be both over inclusive ("just cause" bites may have been included) [FN138] and under inclusive (insofar as victims may have sought treatment at other facilities).

*22 Another CDC study attempted to identify the incidence of dog bites in a particular locality: Denver, Colorado. [FN139] The authors examined reports from the Denver Municipal Animal Shelter in 1991. [FN140] There were a total of 991 bites during the study period. [FN141] However, only 178 were eligible for the study, [FN142] as the authors excluded several categories of bites: bites involving household members, attacks involving multiple dogs, attacks before 1991, dogs which had been owned for less than 6 months, cases in which the owner did not live in Denver County, attacks where the owner's phone number was not listed on the report, and cases in which the victim did not receive medical treatment. [FN143]

The study created a control group of dogs to try to determine whether certain characteristics (such as breed) made a dog more likely to bite. [FN144] Using a multivariate statistical analysis, the study concluded that biting dogs were more likely than control dogs to be German Shepherds or Chow Chows, male, intact (not neutered), and reside in a house with one or more children. [FN145] Denver had (and still has) a ban on Pit Bulls, so it is not surprising that no cases involved that breed. [FN146]

The authors acknowledged that their results had several problems. First, they were only able to speak to owners of approximately half of the biting dogs. They excluded cases in which the victim did not seek medical attention. In this respect, the authors believed that seeking medical attention was a "surrogate" for "real bites." [FN147] The authors did not verify the breeds of the dogs involved, but instead "identified predominant breed as whatever breed the owner considered the dog." [FN148] Because of the small number of bites per breed, the authors could not assess the statistical significance of breeds other than German Shepherd and Chow Chow. [FN149]

*23 Another CDC study attempted to determine the frequency of dog bites by conducting a random telephone survey of households. [FN150] The authors used the Injury Control and Risk Survey ("ICARIS"), a random digit dialing telephone survey. [FN151] They asked each adult respondent whether he (or his children) had been bitten by a dog in the previous twelve months and whether the victim had sought medical attention. [FN152] Out of 5,328 completed interviews, 94 adults and 92 children reported being bitten in the previous twelve months. [FN153] Of these, 12 adults and 26 children sought medical care. [FN154] From this data, the authors extrapolated that 1.8% of the American population (4,494,083 people) had been bitten in the previous twelve months, and 0.3% had sought medical attention. [FN155] This shows that non-fatal bites are a public health problem that "is five orders of magnitude greater" than fatal dog bites. [FN156] The study concluded that several factors had no statistical significance on the likelihood of being bitten: census region, urbanicity, race/ethnic group, and household income. [FN157] The study did not attempt to correlate between the number of bites and the breed of dog. The authors acknowledged that the study relied on the self-reporting of data, which was not validated, and that they received a poor response rate (only 56% of people responded to the survey). [FN158]

B. Other Studies

Other studies have attempted to document the total number of dog bites and the number of bites per breed.

A study of ED visits for dog bite injuries [FN159] confirmed many of the conclusions of the previously-discussed CDC study on ED visits. [FN160] The study noted that a lack of a national reporting system for dog bite injuries makes gathering and analyzing data on the subject difficult. [FN161] The authors, *24 in reviewing the literature on the subject, found that previous studies concluded that between 0.3% and 1.1% of all ED visits are due to dog bite-related injuries. [FN162] To determine the true percentage, they collected data from the National Hospital Ambulatory Medical Care Survey ("NHAMCS"), a random surveying instrument that is used to calculate the number of ED visits per year. [FN163] They estimated that between 1992 and 1994, 333,687 annual visits were made to EDs seeking medical treatment for dog bite related injuries. [FN164] This amounted to 0.4% of all ED visits nationwide. [FN165] Looking at the monetary cost of dog bites, they found that the average cost for a dog bite related ED visit was $274, resulting in an annual cost of $102.4 million. [FN166] The study, however, did not address the question of whether certain breeds are particularly more dangerous than others. This is partly due to the unavailability of data through NHAMCS. Moreover, the study most likely undercounted the number of non-fatal dog bites because victims may have sought treatment from places other than EDs. [FN167]

Other studies have attempted to examine the problem at a more localized level. A July 1991 study [FN168] found that dog bites were responsible for 0.3% of all ED visits at The Children's Hospital of Philadelphia. [FN169] Of those visits, 77% involved cases where the victim knew the biting dog. [FN170] The study found one statistically significant conclusion: more Pit Bull injuries were the result of unprovoked attacks as compared to such attacks by other breeds. [FN171] "Unfortunately, the absence of reliable dog breed-*25 specific population figures prevent[ed] the calculation of breed-specific injury rates." [FN172]

An October 1997 study tried to determine the number of dog bites in Alleghany County, Pennsylvania (Pittsburgh) by using the "capture-recapture" method of statistical analysis. [FN173] The authors found that 790 dog bites were reported to the Alleghany County Health Department in 1993. [FN174] Using the capture-recapture method, along with log-linear modeling, the study concluded that the number of unreported dog bites was 1,388 (with a 95% confidence interval of between 1,010 and 1,925). [FN175] The authors cautioned, however, that the self-reporting sources are problematic in that "whether or not a case is reported depends largely on the severity of the event and the attitude, knowledge, or education level of the victim." [FN176] Accordingly, the authors suggested that the actual Pittsburgh dog bite incidence rate must be higher than that found in the study. [FN177]

Another survey [FN178] in Pennsylvania polled children in order to determine an overall bite rate from the perspective of bite victims. [FN179] The survey, conducted in 1981, found that 46.1% of children reported that they have been bitten by a dog during their lifetime. [FN180] The study concluded that "being bitten by a dog is a rather common occurrence for children, especially those between the ages of seven and twelve years, and the event is greatly underestimated by official bite statistics." [FN181] Nevertheless, the authors did not attempt to catalog bites per breed. [FN182]

Unfortunately, not all scientists have used statistically sound methods to draw conclusions about the relative dangerousness of breeds. Two physicians, Lee E. Pinckney and Leslie A. Kennedy, from the Department of Radiology at the University of Texas Southwestern Medical School and *26 Children's Medical Center sent letters to the editors of 245 major newspapers requesting copies of all stories about dog bite-related fatalities. [FN183] The number of fatalities reported by the responding newspapers between March 1966 and June 1980 totaled seventy-four. [FN184] Of the seventy-four fatalities, sixteen were caused by German Shepherds, nine by Huskies, eight by Saint Bernards, six each by Bull Terriers and Great Danes, and five by Malamutes. [FN185] The remaining dog bite fatalities were caused by a variety of breeds, including ten attacks by mixed breeds and five attacks by dogs of unknown breeds. [FN186] In addition to acquiring bite fatality statistics from newspapers, the authors used American Kennel Club ("AKC") registration data to compare the relative number of fatalities per breed. [FN187]

The CDC authors criticized the Pinckney/Kennedy study as being "primarily anecdotal" rather than "systematic" in its approach. [FN188] Indeed, Pinckney and Kennedy conceded that their database was "incomplete" and "may not be entirely reliable." [FN189] Their data depended on newspaper reports, which may themselves be incomplete or inaccurate. Thus, the authors said their data required "cautious interpretation." [FN190] An example of such "cautious interpretation" is represented by the authors' observation that even though German Shepherds were involved in more fatalities than any other breed in the study, such large frequency could be reflective of the fact that German Shepherds had the highest AKC registration of any large breed. [FN191] Hence, the use of AKC data to draw comparisons between breeds is problematic, [FN192] as demonstrated by the high number of registrations for breeds such as German Shepherds, and low number of registrations for a popular breed, such as the Pit Bull. [FN193]

William Winkler's study [FN194] in 1977 has also been criticized for its lack of scientific method. [FN195] His "study" involved compiling news reports from *27 eleven dog bite-related fatalities from January 1974 through December 1975. [FN196] From this data, he made various conclusions about the breeds responsible, finding that, "not unexpectedly," German Shepherds were the breed most often responsible for fatal dog attacks. [FN197] Because St. Bernards were responsible for two deaths during this 24- month period, he concluded, "[t]his relatively uncommon breed may be a greater hazard than others." [FN198]

A common thread running through several studies is the attempt to extrapolate conclusions about breeds based on limited data. For example, an April 2000 epidemiological study in Philadelphia used reports from the Department of Health to conclude that between 1995 and 1997 there were approximately 5,390 bites. [FN199] The authors concluded that Pit Bulls, German Shepherds, and Rottweilers combined were responsible for 59% of bites each year. [FN200] The authors felt comfortable drawing this conclusion despite the fact that they could not determine the breed in 74% of cases. [FN201]

C. The Problem of the Unknown Origin of Aggressiveness

Despite all of the research and studies on the subject, scientists and veterinarians cannot state with certainty or confidence why certain dogs are more aggressive than others. [FN202] It seems that a particular dog may be aggressive because of a variety of factors. [FN203] According to the American Veterinary Medical Association's multidisciplinary Task Force on Canine Aggression and Human-Canine Interactions, "a dog's tendency to bite depends on at least five interacting factors: heredity, early experience, later *28 socialization and training, health (medical and behavioral), and victim behavior." [FN204]

While breed (as an inherited characteristic) is one component of predicting a dog's dangerousness, it is not the only factor. [FN205] There is no way to scientifically determine whether a dog is likely to bite in the future, anymore than psychologists can predict whether certain people will commit crimes of violence. The exception to this rule is the axiom that the best predictor of future behavior is past behavior. For this reason, many veterinary and scientific groups support "dangerous dog laws" which target individual dogs that have demonstrated a propensity to bite or attack innocent victims. [FN206] The problem with BSL and breed discrimination is that legislatures and insurers have attempted to prophylactically determine which breeds are most likely to bite without any evidence of individual dangerousness.

D. The Problem of Numerators and Denominators in Dog Bite Statistics

To date, no scientific study has been able to resolve what I term to be the problem of "numerators and denominators." A person wishing to determine whether certain breeds are more likely to bite than others must first determine the number of bites per breed (the numerator) and then compare that number to the total number of dogs of that breed in the general population (the denominator). This can be expressed as a ratio:

Number of Bites by Breed

Relative Dangerousness Ratio = -------------------------

Total Population of Breed

  This ratio ("RDR") allows for a comparison between breeds. The higher the RDR, the greater proclivity a particular breed has to bite. It allows for a comparison of "oranges to oranges" and "apples to apples." Otherwise, it is likely that highly popular breeds will appear to be more *29 dangerous, when in fact the number of bites is reflective of the overall population of the particular breed.

  A study which tried to extrapolate breed data from the previously-discussed CDC studies agreed that the proper method for determining a breed's dangerousness was the use of a comparative ratio:

   Ideally, breed-specific bite rates would be calculated to compare breed and quantify the relative dangerousness of each breed. For example, 10 fatal attacks by Breed X relative to a population of 10,000 X's (1/1,000) imply a greater risk than 100 attacks by Breed Y relative to a population of 1,000,000 Y's (0.1/1,000). Without consideration of the population sizes, Breed Y would be perceived to be the more dangerous breed on the basis of the number of fatalities. [FN207]

  Using the RDR normalizes the effect of a breed's popularity, or lack thereof. Dogs of popular breeds are going to bite more often simply because there are more of them. [FN208] A January 1997 article warned that, as Dalmatians become more popular, people should expect to see more bites from that breed. [FN209] This is not to say that Dalmatians are inherently more dangerous than other breeds. Rather, an increase in their population should also result in a proportional increase in bites from that breed. [FN210] Similarly, the Pinckney/Kennedy study [FN211] cautioned that, despite the fact that German Shepherds accounted for the most number of deaths, their finding must be read in conjunction with the popularity of the breed, as evidenced by AKC registrations of the same time period. [FN212]

  The problem of numerators and denominators is that it is difficult-if not impossible-to accurately determine the number of bites per breed and *30 the number of dogs in a particular breed. Without an accurate count for either the numerator or denominator, one runs the risk of stigmatizing an entire breed as "overly dangerous" based on the breed's absolute number of bites, instead of examining the breed's number of bites relative to its overall population.

1. The Numerator Problem

  The principal problem in determining the total number of bites by a particular breed is that there is no national reporting system for dog bites. [FN213] The CDC studies [FN214] demonstrate that while fatal dog bites are easier to track than non-fatal bites, even the methodology used to uncover fatalities misses approximately 26% of cases. [FN215] Further, news accounts-on which the CDC relied, in part, to determine the number of fatal dog bites and the breeds involved-may be biased towards reporting attacks by certain breeds. [FN216]

  The numerator may also be biased against dogs that cause more damage, while ignoring breeds that bite more often but do not cause victims to seek emergency treatment. [FN217] If a dog bite does not cause serious injury, it is not likely that the victim would seek medical treatment. [FN218] This then skews the results of studies that use emergency department visits to track the incidence of dog bites. [FN219] "The problem with self-reporting sources is that whether or not a case is reported depends largely on the severity of the event and the attitude, knowledge, or education level of the victim." [FN220] Studies which have used random sampling [FN221] are equally problematic because they, too, depend on accurate self-reporting of their sample groups. The low

response rates of these studies also lead to questions about the accuracy of the results that are extrapolated to the general population. [FN222]

*31 2. The Denominator Problem

No one knows how many dogs are present in the United States at any one time. This should not be surprising, as even the Constitutionally mandated [FN223] decennial census of human beings is known to undercount people. [FN224]

Determining the true number, or even an accurate estimate, of dogs can be problematic. While many dogs are kept as household pets, [FN225] others are used as service animals or guard dogs; kept in animal shelters or animal stores; or simply allowed to wander the streets as strays. The dog population is constantly changing and moving, which makes obtaining an accurate count difficult and expensive.

Even if it was possible to determine how many dogs exist in the country at any one time, the problem then becomes how to determine how many of those dogs belong to each breed. Determining the breed of one dog is difficult enough. [FN226] To take a census of all dogs and identify their breeds would be an impossible task.

Some scientists have suggested using AKC or municipal registration data to determine the number of dogs in a particular breed in a particular community. [FN227] However, one study concluded that city registrations account for only 29.1% of all dogs. [FN228] Further, owners of breeds considered "dangerous" may be reluctant to register their animals. [FN229] This may be particularly true of dogs used for illicit purposes, such as those owned by drug dealers, dog fighters, and gang members. [FN230]

*32 American Kennel Club ("AKC") registration data is also problematic because the AKC only registers pure-bred dogs [FN231] and depends on owners taking the initiative to register their dogs. [FN232] Mixed breeds, for which there are numerous combinations, are not eligible for registration. [FN233] Pit Bulls are often registered with organizations other than the AKC. If owners do register them, they register with the United Kennel Club or the American Dog Breeders Association. [FN234] If a breed is undercounted in the denominator of the ratio, it will make a breed appear more dangerous than it actually is. [FN235]

E. The Problem of Breeds

Breed is a human construct that is used to conveniently group dogs based on similar physical characteristics. [FN236] There is no scientific test to determine a dog's breed. [FN237] The only way to determine a dog's breed is to examine its heredity. This task is made possible but expensive and time-consuming, [FN238] if a dog is registered with the AKC. [FN239]

As examples of the problem of defining and identifying breed, consider the case of Huskies and Pit Bulls. "Husky" refers to a class of dogs, not any one particular breed. Siberian Huskies, Alaskan Malamutes, and Samoyeds are all considered to belong to the "Husky" family, yet they are all different breeds. [FN240] Similarly, there is no AKC-standard breed called *33 "Pit Bull." "Pit Bull" is a collective classification of the American Staffordshire Terrier, Staffordshire Pit Bull Terrier, and Bull Terrier. [FN241]

Scientists have not been able to determine if victims of dog bites can accurately report the breeds of dogs that attacked them. Many scientists, particularly the CDC authors, have stated that misidentification is a likely problem, especially under the stress of a dog attack. [FN242] Part of the problem may be that as a particular breed gets a reputation for dangerousness, some victims jump to the conclusion that they were bitten by a dog of that breed. [FN243]

Even under ordinary, low-stress conditions, many people have difficulty identifying a dog's breed. "For the average person anything with prick ears and blue eyes automatically becomes a 'husky' . . . Any smooth coated brown dog, medium sized, and muscular becomes a 'pit bull' . . . Any tall dog becomes a Great Dane, fuzzy or hairy and it's a Chow Chow. If it's black and tan and heavy it's a Rottweiler, etc." [FN244] One survey of bite reports found that medium-sized black and tan animals were likely to be recorded as German Shepherds. Stocky, short-haired dogs were listed as Pit Bulls. Media reports of Pit Bull attacks are often accompanied by pictures of Boxers or Pugs instead of American Staffordshire Terriers. [FN245] One entertaining website called "Find the Pit Bull" displays 21 pictures of pure-bred dogs and challenges the user to identify the Pit Bull amongst them. [FN246]

Even veterinarians and other experts have difficulty determining whether a particular dog belongs to a particular breed. [FN247] This was a central concern of the Massachusetts Supreme Judicial Court in American Dog Owners Ass'n v. City of Lynn. [FN248] The Court declared the city of Lynn's Pit Bull ordinance to be unconstitutional in part because the animal control *34 officers designated to enforce the ordinance used conflicting and subjective standards to determine and identify breed. [FN249]

The problem of mixed breed complicates the issue even further. In determining a relative dangerousness ratio, it is unclear how to count mixed breeds. [FN250] Should they be counted once per breed? Not at all? Create a new category for each possible combination of breeds? Aside from how to use the raw data on attacks by mixed breed, there is the additional problem of misidentification by lay people. [FN251] Victims sometimes inadvertently report mixed breed dogs as pure-breds [FN252] due to the heat of the moment and their lack of training in identifying subtle breed characteristics.

There is good reason to believe that the raw data being used to calculate relative dangerousness ratios is incomplete and inaccurate. If the data being inputted into the calculation is flawed, the results (claiming to show some breeds are more dangerous than others) are equally flawed. [FN253]

F. The Problem of "Just Cause" Bites

Even if an accurate count could be obtained of the number of bites per breed, there is the additional problem of how to handle "just cause" bites in the resulting statistics. If the purpose is to determine which breeds are inherently more dangerous, just by virtue of the breeds themselves, then the statistics should exclude bites that were justified by the dog. If a Rottweiler bites an intruder who is attacking the homeowner, we would expect the Rottweiler to be praised for defending its owner. This is not the type of bite that we should be trying to prevent. It is also not the type of bite that is likely to lead to an insurance claim. Similarly, if a dog is being physically tormented by a neighborhood child who is poking it in the eye, we would not deny that the dog has an inherent right to defend itself by growling, snarling, barking, or biting back. [FN254] These are "just cause" bites, bites in which the dog has a legitimate reason to defend itself or its owners.

*35 It is possible that the statistics are being skewed because property owners who wish to purchase "guard dogs" may be self-selecting certain breeds based on the popular notions of relative dangerousness. Guard dogs are trained to protect property by scaring away would-be intruders and, if necessary, to bite an actual trespasser. Owners who desire to have guard dogs may rationalize the purchase of one breed over another based on the degree to which they subjectively believe that the dog will be "mean" or "scary." This creates a self-fulfilling prophecy. The "scarier" a breed is considered by a community, the more likely a dog of that breed will be purchasedfor protection, used for protection, and actually bite an intruder. This will skew the statistics in a way that purports to show that the particular breed is, in fact, inherently more dangerous.

Despite these concerns, it appears that the studies to date have not excluded this category of bites from their datasets. [FN255] This is a fatal flaw in the statistics, for it confuses the issue between inherent dangerousness (due to breed) and legitimate animal behavior.

G. The Problem of Breed Switching by Dog Fighters, Gang Members, Drug Dealers, and Other Bad Owners

Assume for the moment that an accurate relative dangerousness ratio could be determined for each breed and that it could be scientifically determined that certain breeds are inherently more dangerous than others. What about the owners? Does this not excuse them from the responsibility to properly train and care for their pets?

The reality is that there is a wide spectrum of responsible pet ownership. For some people, occasionally providing food and water for a dog is considered sufficient. On the opposite end of the spectrum, some people spend thousands of dollars on luxuries such as pet spas, advanced dog agility classes, and elaborate beds. Somewhere in the middle of the spectrum are people who actively ensure that their pets have food, water, and shelter; get exercise; are well-trained; and receive adequate veterinary care. [FN256]

Unfortunately, a small percentage of pet owners breed and use their pets for illicit purposes. They intentionally seek out vicious dogs that will attack and maim humans and other animals. [FN257] Dog-fighting enthusiasts, gang members, and drug dealers will purposely select, breed, and train *36 dogs to be vicious. The purpose may be to intimidate rivals (in the case of gangs and drug dealers), to defend illegal drugs (in the case of drug dealers), or to make money (in the case of promoters of dog fights). [FN258] For some, having a vicious dog is simply a status symbol. [FN259] In order to make dogs into vicious weapons, they use "revolting and painful techniques to bring the animals to the verge of bloodlust." [FN260] Drug dealers in Philadelphia during the 1980s had Pit Bulls named "Murder, Hitler, and Scarface." [FN261] They wore collars that concealed crack, cocaine, and money. [FN262] In Chicago, gang members "brandish[ed] their fierce pit bulls just as they would a switchblade or a gun." [FN263]

Current statistics do not take into consideration the degree to which the source of a dog's aggressiveness is the torturous upbringing described above, as opposed to the dog's breed. [FN264] In those situations, the problem is clearly with the dog owner-not the dog itself or its breed. These problem owners are dangerous with any breed of dog. [FN265]

One solution would be for insurers to write policies that exclude injuries related to dog fighting. This would limit the claims paid out for these high-risk animals, yet it would leave potential plaintiffs without an adequate source of compensation. This result might be a socially acceptable solution because of the unclean hands of the "victims." If dog-fighting exclusions are incorporated into standard homeowners' insurance contracts, the language should be narrowly written to exclude only those bad faith actors who, as a matter of social policy, should not be rewarded or compensated for injuries attendant to an illegal activity. The key would be to write language that would still protect innocent passers-by.

One of the arguments against BSL is that once a breed becomes banned, problem owners will simply switch to another breed. [FN266] In the 1930s, Pit Bulls were far from considered a "vicious breed." In fact, a Pit Bull named "Pete" starred in the Our Gang films of the time. [FN267] Fifty years ago, the Doberman was considered the most vicious dog. [FN268] During the *37 1980s, the focus turned to Pit Bulls. [FN269] In short, today's public target may be tomorrow's favorite pet, and vice versa.

H. Do the Insurance Companies Have Better Data?

It is quite possible that one or more insurance companies have their own proprietary data purporting to show that one breed or another is disproportionately responsible for bites. I am skeptical that their data would be any

better than the CDC's. The problems associated with the CDC and non-CDC studies are inherent to the problem of trying to determine the number of bites per breed and the number of dogs per breed.

III. The Widespread Opposition to Breed Discrimination

Breed discrimination by insurance companies and breed-specific legislation by state and local governments have attracted national attention and outrage by veterinarians, animal groups, and dog owners.

The American Veterinary Medical Association's Task Force on Canine Aggression concluded that BSL and other breed-specific actions are "inappropriate and ineffective." [FN270] The Task Force consisted of a diverse coalition of veterinarians, academics, physicians, insurers, representatives from animal rights advocates, CDC scientists, and lawyers. [FN271] The Task Force agreed that to properly determine the relative dangerousness of breeds, one must first determine the number of bites per breed and the total population of each breed. As noted above, [FN272] the accurate calculation of both numbers is an immense challenge. [FN273]

The Task Force rejected the notion that a dog's breed is the sole determinant of dangerousness. "[A] dog's tendency to bite depends on at least 5 interacting factors: heredity, early experience, later socialization and training, health (medical and behavioral), and victim behavior." [FN274] They also pointed to the problems of mixed breeds, misidentification of breeds, and shifting popularity of breeds. [FN275] The Task Force also expressed concern about making decisions based solely on breed, since there is a lack *38 of scientific means to identify breed. [FN276] The Task Force recommended, instead, that local governments focus on individual dogs and dog owners. [FN277]

The very scientists who have authored studies trying to determine a link between breed and aggressiveness oppose breed discrimination and BSL. In many of the CDC studies, the scientists cautioned against using their incomplete data on attacks to make knee-jerk legislative or policy decisions based solely on breed. [FN278] They pointed to the lack of reliable data on bites per breed (the "numerator problem") and the absence of a reliable count of dogs per breed (the "denominator problem"). [FN279]

Animal groups have also opposed BSL and breed discrimination. The American Kennel Club ("AKC") has taken a strong stance against breed discrimination by insurance companies:

The American Kennel Club believes that insurance companies should determine coverage of a dog-owning household based on the dog's deeds, not the dog's breeds. If a dog is a well-behaved member of the household and the community, there is no reason to deny or cancel coverage. In fact, insurance companies should consider a dog an asset, a natural alarm system whose bark may deter intruders and prevent potential theft. [FN280]

The AKC also issued this statement concerning BSL:

The American Kennel Club (AKC) strongly supports dangerous dog control. Dog control legislation must be reasonable, non-discriminatory and enforceable as detailed in the AKC Position Statement.

*39 To provide communities with the most effective dangerous dog control possible, laws must not be breed specific. Instead of holding all dog owners accountable for their behavior, breed specific laws place restrictions only on the owners of certain breeds of dogs. If specific breeds are banned, owners of these breeds intent on using their dogs for malicious purposes, such as dog fighting or criminal activities, will simply change to another breed of dog and continue to jeopardize public safety. [FN281]

In response to a perceived rise in breed discrimination, the Humane Society of the United States ("HSUS") and the American Society for the Prevention of Cruelty to Animals ("ASPCA") developed a grassroots campaign to

educate the insurance industry. [FN282] Both groups oppose breed discrimination. [FN283] Other groups that have spoken out against breed discrimination include the American Medical Veterinary Association, the American Dog Owners Association, the Westminster Kennel Club, and the American Humane Society. [FN284]

IV. Insurers Fail to Take into Account the Unique and Special Role of Pets in our Society

For at least 12,000 years, the history of the domestic dog, Canis familiaris, has intertwined with that of human beings. [FN285] The law has generally treated dogs as mere property [FN286]-or worse, as non-property. [FN287] As the popularity of dogs as pets has grown, the law has responded in kind by recognizing the importance of dogs, cats, and other pets. The insurance industry, by practicing breed discrimination, has failed to appreciate the unique and special role of dogs to their owners and to society. This section is offered to provide some context for the implications of breed discrimination. This is a problem that has the potential for affecting a large *40 segment of the population and for having damaging effects on the mental, physical, and emotional health of people.

A. The Growing Popularity of Pets

1. Population

A study estimated that in 1998 there would be 53.6 million dogs in the United States, a 2.1% increase since 1991. [FN288] Approximately 34.3% of homes have one or more dogs. [FN289] Dog owners are thus a significant portion of the United States population. They are also a significant pool of customers (actual and potential) for insurers.

2. Spending

To understand the scope and power of the pet-owning population, consider the amount of money that is spent on pets each year. In 1998, Americans spent $11.1 billion on veterinary care alone, a 61% increase from 1991. [FN290] There are over 35 "pet vacation resorts" where dogs and cats can go to be pampered. [FN291] There are also over 650 pet cemeteries in the United States, indicating the extent to which owners will go to memorialize their pets. [FN292]

B. Dogs are Members of the American Family

Breed discrimination ignores the reality that most pet owners consider their pets to be members of their immediate family. [FN293] Indeed, this "coexistence has contributed substantially to humans' quality of life." [FN294] Dogs were initially domesticated to be work animals, assisting humans with farming, herding livestock, and providing security at night. [FN295] In time, dogs became "four-legged members of the family." [FN296] Some dogs provide *41 assistance to humans with disabilities. [FN297] Service dogs serve as a tangible resource for people, not just a source of companionship. [FN298]

Dogs can have positive effects on the health of their owners, [FN299] such as alleviating loneliness and depression, reducing high blood pressure, and addressing obesity. [FN300] On the other hand, these effects must be balanced against the negative health effects of dogs, such as bites and the transmission of zoonotic diseases. [FN301] When the positives are weighed against the negatives, at least one physician has concluded that dogs probably are beneficial to human health. [FN302] Some owners will forego their own health in order to care for their pets-a demonstration of how much pets mean to some owners. "Most physicians are familiar with at least one example of a person refusing hospitalization . . . because there was no one else in the home to care for their pet." [FN303]

The loss of a pet can have profound effects on an owner. A number of organizations provide bereavement support for people whose pets have died [FN304] and at least three greeting card companies make sympathy cards specifically for the loss of a pet. [FN305]

Breed discrimination forces pet owners to choose between their homes and their dogs. Forcing owners to make this choice represents a significant misunderstanding of the role of pets in our society. For some pet owners, giving up a pet is like losing a child, sibling, or spouse.

C. The Consequences of Breed Discrimination

When a dog bites, it can have lasting consequences for both the dog and its owner's family. When an insurance company refuses to insure or renew a household based on a particular breed of dog, it too can have far-reaching consequences.

*42 Most people do not respond appropriately if their dog bites someone. Most punishment is too severe and too late to be of any value to the dog in preventing future occurrences. [FN306] The dog is usually isolated from the family and visitors. By limiting interaction with humans, the dog does not learn how to deal with people appropriately. [FN307] Isolation may also lead to inadequate medical care, which may in turn lead to serious health problems for the dog. [FN308]

Some owners abandon their dogs or euthanize them either out of frustration in not being able to correct aggressive behavior or because an insurance company tells them to do so in order to get homeowners' insurance. [FN309] When BSL goes into effect or insurance companies discriminate, it causes some owners to purposely assume a sheltered and low profile in the community to avoid being caught with an unauthorized pet. [FN310] Shelter drop-offs are common after BSL goes into effect or insurers begin to discriminate based on breed. [FN311] The Humane Society in Atchison, Kansas, reported a 40% increase in drop-offs of Rottweilers because of breed discrimination. [FN312] This is unfortunate because many shelters can only keep dogs a certain number of days before euthanizing them. Breed discrimination can have a chilling effect on ownership of certain breeds, [FN313] which means certain breeds are not likely to be adopted and will have to be euthanized.

Breed discrimination will likely have an effect on homeownership in states that permit this practice. Homeowners' insurance is the "gatekeeper" to homeownership. Without homeowners' insurance, a person cannot get a mortgage. Without a mortgage, most people cannot buy a house. [FN314] An insured who chooses to lie about a dog's breed or the existence of a dog altogether is committing policy fraud, running the risk of criminal prosecution [FN315] and the complete cancellation of his or her policy. [FN316]

*43 D. The Law is Beginning to Recognize Pets as More Than Mere Property

The problem of breed discrimination should be viewed in light of modern developments in animal law, which is beginning to recognize that animals are more than mere property. Until recently, the legal status of animals was governed by an 1897 Supreme Court case, Sentell v. New Orleans & C. R. Co. [FN317] The case involved a Newfoundland named Countess Lona who was killed by a railroad car. [FN318] Her owner brought suit against the railroad for negligence. The railroad defended by relying on a statute that prohibited an owner from recovering for more than the declared value on the animal's registration form. [FN319] An owner whose dog was not registered could not recover anything for the loss of or damage to the animal. [FN320] Countess Lona's owner brought suit, challenging the constitutionality of the law. [FN321]

The Supreme Court held that the statute was constitutional as a valid exercise of the state's police power. [FN322] The Court declared that dogs are a form of quasi-property that is "imperfect or qualified" in nature. [FN323] The Court relied on the common law rule that dogs could not constitute stolen property for purposes of

larceny statutes. [FN324] The common law held that wild animals had no property value until killed or subdued. [FN325] Domesticated animals, such as horses, cattle, sheep, and other "work" animals, were considered "perfect and complete" property. [FN326] Dogs fell in a third category, that of "cats, monkeys, parrots, singing birds, and similar animals, kept for pleasure, curiosity, or caprice." [FN327] The Court saw no useful, social value for dogs, except for companionship, which the Court dismissed as unsatisfactory for the establishment of a property interest. Thus, the Court held that property interests in animals are on a continuum: wild animals (animals ferae naturae) on one end, domesticated animals (such as horses, cattle, and sheep) on the other end, and dogs somewhere in *44 between. [FN328] To the Sentell Court, dogs hold "their lives at the will of the legislature, and properly falling within the police powers of the several states." [FN329] The Court concluded, "It is purely within the discretion of the legislature to say how far dogs shall be recognized as property, and under what restrictions they shall be permitted to roam the streets." [FN330]

The question of the legal status of dogs and other pets has recently been addressed by courts in the context of family disputes. Bennett v. Bennett [FN331] and Arrington v. Arrington [FN332] typify the majority rule with respect to the "custody" of pets upon their owners' divorce. In both cases, divorcing couples sought both custody and visitation of their dogs. In Bennett, the trial court awarded legal custody of the dog, Roddy, to the husband, with the wife receiving every-other-weekend and holiday visitation rights. [FN333] Subsequent squabbling between the parties led the Court to modify its order to have the parties swap custody of the dog every month. [FN334] The appellate court reversed the trial court's order and affirmed the Sentell doctrine: "While a dog may be considered by many to be a member of the family, under Florida law, animals are considered to be personal property." [FN335] The court found that the trial court lacked authority to order visitation rights in mere property. [FN336]

The court in Arrington reached a similar conclusion. Arrington involved a custody dispute over Bonnie Lou, "a very fortunate little dog with two humans to shower upon her attentions and genuine love frequently not received by human children from their divorced parents." [FN337] The trial court had awarded custody of Bonnie Lou to Mrs. Arrington. Mr. Arrington appealed, claiming he should have been appointed "managing conservator" (primary guardian) of Bonnie Lou. [FN338] The Court held that *45 managing conservatorships were designed for humans, not animals. [FN339] The Court held, "A dog, for all its admirable and unique qualities, is not a human being and is not treated in the law as such. . . A dog is personal property, ownership of which is recognized under the law." [FN340]

There is an indication that the legal status of dogs and other pets may be beginning to change. In Raymond v. Lachmann, the court had to determine the custody of a cat named Merlin. [FN341] The defendant originally owned Merlin, but left him for 1 years with a former roommate, the plaintiff. [FN342] During that time, the plaintiff renamed him "Lovey" and grew to be quite attached to him. [FN343] The trial and appellate courts both held that Lovey should remain in the custody of the plaintiff, who had taken care of him for a lengthy period of time. What is remarkable about this case is that the court used a "best interests of the cat" standard to decide the issue. The court discarded strict application of property law and in its place adopted a version of the "best interests of the child" standard from (human) family law. The court held:

Cognizant of the cherished status accorded to pets in our society, the strong emotions engendered by disputes of this nature, and the limited ability of the courts to resolve them satisfactorily, on the record presented, we think it best for all concerned that, given his limited life expectancy, Lovey, who is now almost ten years old, remain where he has lived, prospered, loved and been loved for the past four years. [FN344]

Some courts have also recognized that pets are more than mere property in the context of tort awards. In Corso v. Crawford Dog & Cat Hospital, Inc., [FN345] a New York City Civil Court judge awarded $700.00 in damages to the owner of a deceased poodle. The dog had been euthanized by the defendant, on instructions from the plaintiff. [FN346] "The plaintiff had arranged for an elaborate funeral, . . . including a headstone, an

epitaph, and attendance by plaintiff's two sisters and a friend." [FN347] When the *46 plaintiff opened the casket, however, she saw the body of a dead cat. [FN348] She brought suit, alleging that she had suffered emotional distress as a result of the incident. [FN349] The court held that the plaintiff was entitled to sue not just for the market value of the dog (for conversion of her property) but also for her mental anguish and suffering in seeing the cat instead of her dog. The Court stated:

This court now overrules prior precedent and holds that a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property. . . . A pet is not an inanimate thing that just receives affection it also returns it. . . . To say that [the poodle] is a piece of personal property and no more is a repudiation of our humanness. This I cannot accept. [FN350]

Dicta in other cases demonstrate that courts are beginning to rethink the concept that pets are mere property. In Bueckner v. Hamel, [FN351] the Texas Court of Appeals had to decide the amount of damages to be awarded the owner of then deceased dogs, a Dalmatian and an Australian Shepherd. [FN352] The defendant shot the dogs while they were chasing a deer. [FN353] The plaintiffs brought suit to recover damages for the loss of their property, which the trial court found "had special value to the Plaintiffs and were loved as pets by the Plaintiffs." [FN354] The majority concluded that, "Texas law recognizes a dog as personal property" [FN355]-a holding consistent with Sentell. The majority went on to hold that the plaintiffs could recover only for the loss of value of prospective puppies but only in the context of how much the animal itself would be worth as breeding stock. [FN356]

A concurring judge took a broader view of damages in the case. He said the award for damages should be based on "the intrinsic or special value of domestic animals as companions and beloved pets." [FN357] The market value was inadequate to compensate the plaintiffs for the full extent of their *47 loss. [FN358] "It is common knowledge among pet owners that the death of a beloved dog or cat . . . can be a great loss." [FN359] He called for the acknowledgment of pets as a special form of property [FN360] based on the relationship between humans and their pets:

Many people who love and admire dogs as family members do so because of the traits that dogs often embody. These represent some of the best of human traits, including loyalty, trust, courage, playfulness, and love. This cannot be said of inanimate property. At the same time, dogs typically lack the worst human traits, including avarice, apathy, pettiness, and hatred. . . . Losing a beloved pet is not the same as losing an inanimate object, however cherished it may be. Even an heirloom of great sentimental value, if lost, does not constitute a loss comparable to that of a living being. This distinction applies even though the deceased living being is a nonhuman. [FN361]

Juries have been following this trend. In cases where harm had been done to pets, juries have been awarding damages as high as $35,000. In contrast, the average award in the early 1990s was only a few hundred dollars. [FN362]

V. Breed Discrimination Should Be Ended through Legislation or Administrative Regulation

A central principle of insurance law is that insurance companies operate at the pleasure of the states. [FN363] "Indeed, the organization of an *48 insurance company and the conduct of the business of writing insurance is not a right but a privilege granted by the State subject to the conditions imposed by it to promote the public welfare." [FN364] The power to regulate insurance is so strong that a state may take over the entire business of insurance if it decides it is in the public interest to do so. [FN365]

States have the power to regulate insurers as an exercise of their police power. [FN366] Although insurance law is governed in part by contract law, [FN367] it is also quasi-public in nature. [FN368] States have the

power not just to regulate insurance contracts, but also to declare the terms and conditions of those contracts and to impose additional duties and obligations. [FN369] On the other hand, when a state does not regulate a particular practice of the insurance industry, companies are free to contract as they see fit. [FN370]

*49 States regulate and legislate insurance on behalf of the public interest. Regulations counterbalance free market forces to protect the public at-large. [FN371] Some states prohibit unfair and deceptive trade practices. [FN372] Some administratively set rates. [FN373] In determining whether a rate is reasonable, states will look to see if the rate is based on "legitimate cost factors." [FN374] Some states require insurers to write policies for particular risks, even though the marketplace may have determined such insureds are poor risks or that they are simply uninsurable. [FN375]

In 1997, Professor Hellman evaluated the widespread practice of the time of insurers in denying health, life, and disability coverage to victims of domestic abuse. [FN376] She presented a compelling and detailed analysis of the philosophical and legal implications of this practice, ultimately concluding that state legislatures should intervene and prevent underwriting decisions based on a customer's history of domestic abuse. [FN377]

Professor Hellman's analysis started with the premise that insurers had been able to draw an actuarially justified conclusion that domestic abuse victims were, from a statistical standpoint, more likely than others to be victimized in the future and, thus, to result in claims against their insurers. [FN378] Domestic abuse victims were a higher risk-so high, the insurers concluded, that the insurance pool could not bear to have them as a risk, no matter how high the premium. [FN379] Breed discrimination is an entirely different problem altogether. There is a lack of statistically and *50 scientifically sounddata to show that certain breeds are more dangerous than others. Even if such data existed, a plausible case could be made that the breed of a family's dog should not be used as a factor in underwriting.

A. Insurers Have a Duty to Make Underwriting Decisions Based on Actuarially Justified Factors

In making underwriting decisions, insurers decide which of many risks to insure in order to protect their fiscal solvency and profitability. [FN380] When an underwriter decides not to insure a particular risk, the would-be insured is left to find insurance elsewhere. If no insurer will underwrite or accept the risk, the result may be a cost-shifting to society [FN381] or the loss of an economic opportunity to a consumer. [FN382]

The question then becomes which factors an insurer may consider in making its underwriting decisions. Insurance is a highly regulated industry. It does not operate in a regulatory vacuum, free to let the give-and-take of the marketplace decide who gets insurance, how much coverage they get, and how much it will cost them. There is social utility in making insurance available to the most number of people as possible. [FN383] Insurance allows people to buy homes, afford health care, and drive automobiles. [FN384] The high stakes and high social utility of insurance have historically justified strict government regulation of the industry. [FN385]

All states require underwriting decisions to be based on actuarially sound data. [FN386] In Maryland, for example,

*51 An insurer or insurance producer may not cancel or refuse to underwrite or renew a particular insurance risk or class of risk for a reason based wholly or partly on race, color, creed, sex, or blindness of an applicant or policyholder or for any arbitrary, capricious, or unfairly discriminatory reason. [FN387]

Maryland law also provides that underwriting must be accomplished "by the application of standards that are reasonably related to the insurer's economic and business purposes." [FN388]

Actuarially justified underwriting is not only the law, it is good business. By accurately separating out risks into "not insurable" and "insurable" (and, then, in turn, separating out insurable risks into various risk classifications), actuarially justified underwriting promotes efficiency and profit. Consumers are not allowed into the insurance pool when the likelihood of loss is so high that inclusion of their risks threatens the viability of the pool itself. [FN389] For those insureds allowed in the pool, actuarially justified underwriting promotes efficiency by assigning low premiums to low-risk insureds and high premiums to insureds more likely to have a claim. [FN390] This creates a market incentive for low-risk insureds to participate in the pool as opposed to engaging in adverse selection. [FN391] Accurate risk classification also maximizes profits for the insurer. By eliminating the highest-risk insureds from the pool, an insurer keeps *52 premiums low for the low-risk insureds who remain. An insurer who does not maintain its "classification edge" faces the potential of having its low-risk insureds leave to join other companies who are able to charge lower premiums due to better risk classification decisions. [FN392] The insurer is stuck with its high-risk insureds as well as the high-risk insureds who migrate over from the insurer's competition. [FN393] This means that the insurer is not maximizing its profitability.

How much statistical correlation is required for a rating factor to be "actuarially fair"? How legitimate do "legitimate cost factors" have to be? [FN394] Certainly, perfect 1:1 correlation is not required. [FN395] Thus, I do not suggest that insurers must be able to demonstrate that every Chow Chow will have an unjust bitein its lifetime. Risk classification necessarily will involve some "false positives." [FN396] Otherwise, insurers would be very limited in the classifications they could use, there would be insufficient stratification of the rate pool, and the dangers of moral hazard [FN397] and adverse selection [FN398] would increase dramatically. On the other end of the spectrum is the insurers' position, that any correlation is sufficient. [FN399] This is not an economically viable position for an insurer, since low-risk insureds may be incorrectly classified as high-risk customers, and high-risk insureds might be priced out altogether. [FN400] For example, my ownership of a Rottweiler and a half-Chow put me in an irrationally high-risk classification-so high that every insurer except the Farm Bureau declined to provide coverage. The dozen or so insurers that I contacted in Lubbock who declined to provide coverage lost out on what would otherwise be a low-risk insured, simply because they adhered to a hypothesis (Rottweilers and Chow Chows are more dangerous than other dogs) that has not been scientifically proven. In my case, the insurer who used a more actuarially sound rate classification structure (the Farm Bureau) benefited by offering *53 a low-risk consumer a low-risk premium, thus gaining a market advantage over its competition. [FN401]

I do not believe there exists sufficient data for an insurer to even justify a weak correlation between breed and bite risk. Insurers should work to minimize the risk of false positives so as to "fine tune" its risk classifications to the greatest extent possible. [FN402] Risk classifications should be sufficiently refined so as not to be overbroad. Excluding all dogs would clearly be overbroad and would come with high social costs. Excluding some breeds is also unsound, based on my review of the scientific literature. [FN403] What I propose-and what the Task Force on Canine Aggression and Human-Canine Interactions proposed [FN404]-is the refinement of breed-specific actions by legislatures and insurers to control and regulate "dangerous dogs." Dangerous dogs are those that have demonstrated (on an individual, dog-by-dog basis) a propensity for violence. This would be actuarially fair because adequate evidence exists that a dog with a history of unjustified bites is likely to be dangerous in the future.

As demonstrated in Part II of this article, there is insufficient evidence to support the insurance industry's argument that certain breeds bite more often. In other words, the current risk classification (by breed) is too general and is generating too many false positives while at the same time having unnecessary social costs. A spokesperson for the III recently conceded, "[T]he industry isn't positioned to determine which dogs should be deemed vicious. [W]e're certainly not dog experts or *54 veterinarians." [FN405] Unless and until the industry can demonstrate that different breeds have different relative dangerousness ratios with some degree of accuracy, breed discrimination should be opposed by the general public, insurers themselves, and regulators.

B. Even if Insurers Could Actuarially Justify Breed Discrimination, There are Good Arguments to Support Regulation in the Public Interest

The law is full of examples where "actuarially fair" factors have nevertheless been prohibited in underwriting because of overriding public interests. Statistical correlation between behavior and risk, therefore, is only the first step in a much bigger, public policy analysis. Drive-through deliveries, [FN406] preexisting medical conditions, [FN407] civil rights, [FN408] and witness *55 intimidation [FN409] are all examples of where otherwise actuarially justified practices were prohibited by state legislatures and courts due to overriding interests in equality, health, and fairness.

Part IV demonstrated the importance of dogs and other pets in society. Pets provide physical and emotional benefits to humans and are not mere property. Even if breed discrimination was actuarially justified, I think a plausible argument would exist that the practice should be regulated because of the public interest in protecting animal-human bonds.

There is an additional, and arguably more important, social value that is compromised by breed discrimination: homeownership. Most home buyers require homeowners' insurance in order to purchase a home. This *56 requirement comes from mortgagors, who require some protection in the event their security (the home itself) is destroyed, damaged, or otherwise made unavailable for collection. [FN410] As the Seventh Circuit stated in NAACP v. American Family Mutual Insurance Co., [FN411] "No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable." [FN412] The issue in American Family was a practice known as "red-lining" where homeowners' insurance companies were charging higher rates, or declining to write insurance altogether, based on geographic location of insureds. [FN413] The boundaries ("redlines") which defined the no-insurance zones frequently fell along racial and socioeconomic lines, and the NAACP brought suit alleging that this practice was discriminatory and illegal. The Seventh Circuit held that red-lining violated the Fair Housing Act, a statute passed by Congress to prohibit discrimination in the housing market. [FN414]

It is quite possible that red-lining was actuarially justified; that is, it may have in fact cost insurance companies more to write policies in certain areas than others. This, however, didnot end the inquiry for Congress or the Court of Appeals. The Seventh Circuit held that homeowners' insurance is a service that has the power to make homeownership available. [FN415] If a plaintiff can demonstrate that an application for homeowners' insurance was rejected or unfairly rated on the basis of race or another prohibited factor, the practice constitutes discrimination in housing. [FN416]

Homeownership is a worthwhile public interest. People who own their homes develop roots in a given community. A homeowner is less likely to leave than someone who is in a year-to-year or month-to-month lease. The homeowner, therefore, has a personal investment in the well-being of the community. Homeownership provides an incentive for civic involvement and community-wide improvement. For many families, homeownership is the way to accumulate wealth for the future. [FN417] Home equity can be *57 borrowed against for emergencies, higher education, or retirement. [FN418] The family home is often the most significant component in an estate after a parent dies. [FN419]

Breed discrimination should, thus, be viewed in a larger social context. There is a high social cost when someone is denied homeowners' insurance: he is unable to buy a home. [FN420] The social harm in preventing the dream of homeownership must be weighed against the small risk of a dog bite claim. There are over 50 million dogs in the United States, yet only a few dogs have been responsible for biting people.

This is not a simple matter of deciding to throw away the family trampoline or forego the purchase of an in-ground pool. Pets are not mere property. To make people choose between the family pet and homeownership is unfair, unnecessary, and goes against an important social value: homeownership.

C. Are There Other Means for Insurers to Control Risk?

   Let me assume for the moment that insurers could demonstrate with some degree of actuarial confidence that some breeds are more likely to bite than others. Could there be other ways of controlling this risk, short of outright denial of coverage?

1. Exclusions

   When I was shopping for homeowners' insurance, one of the first questions I asked insurers was whether they would write a policy with an exclusion for dog bites. I did this because I was desperate-I needed insurance and I was willing to assume the risk that my dogs were not dangerous and were not likely to bite someone. Insurers still turned me away. They refused to write a policy with a dog bite exclusion in it.

   There are several good reasons why exclusions may not be good public policy or wise business sense. Exclusions operate to the detriment of third parties, those would-be plaintiffs who are injured and need compensation for their loss. Exclusions would create pockets of plaintiffs who would, in effect, have no way to satisfy a judgment if they could prove liability. This is not an insignificant public policy, for the same reason that states require *58 certain professionals to have liability insurance [FN421] and drivers to carry minimum limits on their automobile policies, [FN422] to provide a source of recovery for third parties in the event of a legitimate claim. If we exclude dog bites or even those dog bites from breeds we can prove are the most dangerous, we would run the risk of creating a special class of plaintiffs who would have no source of recovery. Plaintiffs would have to turn to other sources in order to have their basic medical needs met. [FN423]

   Exclusions are also bad for business because they make insurance less attractive to consumers. A person with cancer is a much higher risk than a healthy individual. If a health insurer began excluding coverage for cancer treatment, few employers or individual consumers would purchase that company's insurance. My decision to try to bargain my way into the insurance risk pool by excluding dog bites from coverage was, in reality, pretty stupid. In the rare event that I was found liable for one of my dogs biting someone, I would be solely responsible for the judgment against me. I would lose whatever equity I had in my house, my car, my savings, and I could have my wages garnished. In retrospect, an exclusion would not have been a good choice for me.

2. Insure But Place Families with Certain Breeds in Higher Risk Classifications

   Another option would be for insurers to write policies for families with "dangerous" breeds but charge them higher premiums. Risk classification is an accepted practice in the insurance industry. [FN424] By separating and grouping people of similar risks, insurers keep rates low for the desirable, low-risk insureds, and insure adequate resources in the event that high-risk insureds cause a claim. [FN425] I would have the same objection to high-risk classification for owners of certain breeds as I would for outright refusals to insure, that is, the lack of actuarial justification for the practice of breed discrimination. Classifying certain dog owners in a higher category is *59 unfair because it places those insureds in an artificially higher rate bracket. This is economically inefficient, although perhaps more profitable for the insurer.

   Where I think risk classification could work is if insurers could demonstrate-to the veterinary and CDC communities with a sufficient degree of scientific certainty-that certain breeds, when they do bite, cause more damage. It is hypothesized, for example, that the jaw structure of Pit Bulls causes them to inflict more injury than other breeds. [FN426] This would still be breed discrimination [FN427] but, in my view, an acceptable form of risk classification provided there is a scientific/veterinary basis for the conclusion. To date, the studies in this area have focused on determining the number of bites per breed, not the amount of damage per bite.

I believe insurers would also be actuarially justified in classifying homeowners based on whether or not they own a dog, period. One does not need to be an actuary to state that a dog owner is more likely than a non-owner to have a bite claim against them. Insurers could simply classify all dog owners at a higher rate level because they are more likely to have claims against them. Let's be clear: This is not what is going on right now. The current practice of breed discrimination is to differentiate between breeds, even though there is no statistical evidence to prove that certain breeds are more dangerous than others. This creates an artificial risk classification that charges owners of certain breeds more than others.

If all dog owners were classified at a higher rate than non-dog owners, I think there would be a great public outcry. Then the social value of dogs as pets-and as security alarms on four paws-would come to the forefront of the debate.

3. Allow the Marketplace to Correct Itself

If, as I conclude, there is no reliable data to support breed discrimination, then there is a market of consumers (owners of Rottweilers, Pit Bulls, etc.) being overcharged or not served altogether. This creates an economic inefficiency. An insurer with good business judgment would seek to corner this underserved market by writing policies with low-risk premiums.

*60 There are a number of reasons why the market is not correcting itself. The number and identity of people being affected by breed discrimination is unknown. Without this data, it would be difficult for an insurer to market itself to those consumers. Also at work is the fact that insurers try to market themselves to the lowest risk consumers. Although these consumers pay lower premiums, they are responsible for fewer claims. Every insurer tries to maximize its number of low-risk insureds while maximizing the number of high-risk insureds who are serviced by its competitors. [FN428] The insurance industry as a whole appears to be caught up in this breed discrimination hysteria. Individual companies may fear that the assumptions behind breed discrimination are in fact true and therefore see little incentive to market themselves to people they view as high-risk. For these reasons, it is unlikely that the marketplace will correct itself to end breed discrimination.

D. Other Solutions Exist to Reduce the Number and Severity of Dog Bites

Preventing law-abiding homeowners from obtaining insurance is not the answer to the problem of dog bites. Better and more effective alternatives exist. [FN429]

1. Collect Better Data

An initialfirst step would be to improve surveillance and reporting of dog bites. Until accurate numbers for the numerator and denominator in the relative dangerousness ratio can be ascertained, insurers and governments will be without realistic data on which to make meaningful decisions. The need for more accurate data collection has been championed by the very scientists who have tried to calculate the scope of the dog-biting problem. [FN430] In addition, studies should be commissioned to *61 determine if certain breeds, when they do bite, cause more physical injury or damage. [FN431]

2. Enforce Existing Laws Against Dog Fighting and Dogs-at-Large

There are existing laws that, if enforced more vigorously, could reduce the number of dog bites. Dog fighting is a cause for why some dogs are vicious. This underground industry brings some dogs "to the verge of bloodlust." [FN432] By shutting down criminal organizations of illegitimate breeders, promoters, and owners, local governments could take a first step towards reducing bites by dogs that have been purposely bred to be

dangerous. [FN433] The American Kennel Club and other groups support the use of existing laws to break up dog fighting rings. [FN434]

Many attacks appear to be caused by strays or dogs that have been permitted to run off-leash. [FN435] The enforcement of existing laws against "dogs at-large" could reduce the number of bites. [FN436] While these laws exist in many places, they are not adequately enforced.

Owners are sometimes to blame for socializing a dog to be dangerous or for permitting it to get into situations where it can cause injury. Dog fighting, leash, and at-large laws address the root of the problem, which is irresponsible dog ownership. A dog is just as good as his owner trains him to be. One problem dog can be seized and destroyed. One problem owner, however, can continually breed, adopt, or purchase dog after dog. Replacing one dog for another, or one breed for another, will not help to reduce the overall problem of owner irresponsibility. [FN437] Existing laws can and should be used to address their behavior.

*62 3. Regulate Problem Dogs with Existing "Dangerous Dog" Laws

Some dogs, as a result of socialization (or lack thereof), bad temperament, or genetics, demonstrate that they are dangerous. They have a history of bites or attacks against people or other animals. [FN438] By regulating these individual dogs, municipalities can focus their efforts on the specific dogs likely to cause injuries in the future. [FN439] Instead of targeting an entire breed, governments can address the handful of dogs that are really the problem.

There are existing laws which permit local governments to regulate, or in some cases seize and destroy, dogs which have demonstrated a propensity to bite without just cause. Michigan enacted a statute to permit local governments to seize "dangerous animals" and have them tattooed, insured, fenced, sterilized, destroyed, "or any other action appropriate to protect the public." [FN440] The statute provides due process protections to the owner-requiring a hearing by a judge and a finding of dangerousness before a disposition is ordered. [FN441] A dangerous animal is one who, without just cause, [FN442] bites or attacks a person, or a dog that bites or attacks and causes serious injury or death to another dog while the other dog is on the property or under the control of its owner. [FN443] Oklahoma has a similar statute that allows for heightened regulation of animals declared dangerous by their conduct, [FN444] but prohibits local governments from enacting breed-specific legislation. [FN445]

"Most of the approximately 55 million dogs in the United States never bite or kill humans." [FN446] Dangerous *63 dog laws are narrowly tailored to address the real problem, which is the small percentage of the overall dog population that is responsible for bites, injuries, and deaths. [FN447] Dangerous dog laws exist in many states. Insurers could work with local governments to fund additional animal control officers or work with owners of dangerous dogs to help take steps to prevent future dangerous acts. [FN448]

4. Educate the Public, Particularly Children, About Animal Behavior

Insurers and local governments could partner together to educate the public about proper ways of socializing and approaching dogs. Proper training is essential for a family with a new dog. [FN449] Public education about the importance of neutering can reduce the incidence of dog bites [FN450] because a disproportionate number of bites are caused by intact dogs. [FN451] *64 New owners should also be educated about the steps in picking the right dog for a household. [FN452] "[T]here is no all-around best breed." [FN453] Certain breeds will be more compatible with certain types of families. [FN454]

Children must also be educated about dealing with dogs safely. [FN455] At least one study has demonstrated the effectiveness of public education as a way to improve children's behavior around and towards dogs.

[FN456] The study, conducted in Australia, examined the reactions of children, ages 7-8, to a dog that was tied up in their playground. [FN457] Half of the study group received a 30-minute classroom lesson 7-10 days before on how to safely approach and treat dogs. [FN458] Researchers observed the reactions of the children to the dog. [FN459] The group that received the classroom instruction displayed greater precautionary behavior than the control group. While *65 79% of the control group hastily patted the dog and tried to excite it, only 9% of the group that received instruction did so. [FN460]

Conclusion

   While dog bites are serious events for those who are bitten, the dog bite problem is not the public health crisis that the insurance industry has made it out to be. Some perspective is in order. The number of fatalities due to dog bites is very low when compared to the number of people who die from heart disease, cancer, accidents, suicide, and diabetes. Likewise, nonfatal bites are responsible for a small number of injuries when compared to other accidental, unintentional injuries. Falls (11.5 million), motor vehicle accidents (4.3 million), drugs (3.3 million), sports (2.0 million), insect bites (1.7 million), bicycle accidents (1.4 million), poisoning (.7 million), and knives (.6 million) all individually outrank dog bites (.5 million) as public health problems. [FN461] Similarly, claims paid out by homeowners' companies for dog bites are miniscule when compared to payouts for property damage. Damage due to fire, water, wind, and theft represent much larger problems for homeowners' insurance companies.

   One way to eliminate the entire problem of dog bites would be to outlaw all dogs. [FN462] Without dogs, there would be no dog bites, and no dog bite-related insurance claims. [FN463] While this would result in an elimination *66 of the perceived financial burden to insurers, it would not be "practical, realistic, or desirable" to the average layman, scientist, or dog owner. [FN464] Unless we as a society are willing to disregard the social and health benefits of dogs as pets, then we must be willing to accept a certain number of bites. While "[t]he dog bite problem as a whole is not preventable, it is controllable." [FN465] Better alternatives to breed discrimination exist, such as education and enforcement of existing dangerous dog laws.

   With over 34% of households owning at least one dog as a pet, dogs have become valued four-legged members of our society. To the families that love them, pets are not mere chattel. Refusing to write homeowners insurance policies, therefore, should be a narrowly curtailed remedy, limited to those families who own dogs that have proven to be dangerous to life or property. The insurance industry has chosen to paint with a very broad brush. Breed discrimination is an overreaction, an attempt to solve a small problem by prejudging all dogs of certain breeds as likely to be dangerous in the future.

   When insurers develop underwriting standards and decide which risks to insure, they have a responsibility to the public interest. Insurers do not contract with consumers in a vacuum. A long history of state regulation of the industry serves as a backdrop for this issue. Underwriting decisions should be the product of reason, not speculation. In other words, if insurers are going to engage in breed discrimination, they better have hard science to back up their practice.

   The science behind dog bites is inconclusive at best. Most of the scientists authoring studies on dog bites have acknowledged that their data is incomplete and should not be used to enact breed-specific legislation or to deny insurance to families with certain dogs. No study has accurately or completely determined the number of bites per breed, nor the number of dogs per breed. Without these numbers, it is impossible to compare breeds on the basis of dangerousness. Insurers who are making judgments about certain breeds are doing so without adequate scientific evidence. This is the Achilles' heal of breed discrimination; by acting without adequate evidence, the insurance industry has left itself open to regulation by the states.

State regulation is necessary to correct this injustice in the marketplace. Insureds are being shut out of entire markets because of the near-hysteria that has gripped the insurance industry. This is not a new phenomenon for the industry. In the past, insurers have cut benefits and denied applications *67 for insurance based on fiscal cost-benefit analyses that have had collateral social and health consequences. It was more costly to keep new mothers in the hospital for 48 hours. Our society came to the recognition, however, that discharging new mothers and their newborns within 6 hours of delivery was against public policy. Legislatures stepped in to correct the injustice in the marketplace, knowing full well that it would cost the industry more money. The same should be done here.

To the insurance industry, breed discrimination reflects a belief that denying coverage to families with certain breeds of dogs will save them money. Insurers have not produced scientific proof that dogs of certain breeds bite more often or cause more damage. The evidence simply does not exist because of the problems of data collection that I have highlighted here. The irony is that insurers who are practicing breed discrimination are turning away good customers who pay premiums. Legislative action to correct this practice will benefit both families with dogs and the shareholders of insurance companies.

Legislative action in this area is both appropriate and necessary. What happened to me is happening across the country to thousands of other families. To some insurers, dogs are mere property-like an old can of paint that can be left behind when a family moves. The truth is that dogs are members of the American family and deserve to be treated as such. When families are forced to make the choice between owning a home and having a dog, some have no choice at all; they must give up their beloved pet to an animal shelter. There are documented increases in "shelter drop-offs" due to breed discrimination. These animals cannot be housed indefinitely, so many have to be euthanized.

The social cost to families is too much to ride on incomplete statistics and hunches by insurance executives. Legislative action is necessary. Luckily, many state legislators have become aware of this problem and have taken steps to end breed discrimination. Pennsylvania enacted a statute prohibiting breed discrimination, which states the following:

No liability policy or surety bond issued pursuant to this act or any other act may prohibit coverage from any specific breed of dog. [FN466]

New York is considering legislation that would outlaw breed discrimination as well. Bill 6761 would prohibit insurers from refusing to issue or renew, canceling, or charging or imposing an increased premium *68 or rate for owning a dog of a specific breed. [FN467] A New Hampshire bill would prohibit non-renewal or cancellation of a policy "based solely on the insured owning a certain breed of dog." [FN468] Other states should follow suit and enact legislation or administrative regulations to prohibit the practice of breed discrimination.

[FN1]. The Farm Bureau provides a number of services to its members, including insurance and banking. See Tex. Farm Bureau, at http://www.txfb.org (last visited July 7, 2004).

[FN2]. On the other hand, renting would not necessarily have been an easy task either. Many landlords prohibit certain breeds from living on their property or forbid dogs altogether. Obtaining renters' insurance would also have been difficult because of breed discrimination by insurance companies.

[FN3]. See infra Part IV.C. for a discussion of the effects of breed discrimination.

[FN4]. See 42 U.S.C. §§ 3601-31 (2003); Mich. Comp. Laws § 37.2302 (2001); N.J. Stat. Ann. §§ 10:5-4, 10:5-9.1 (2002); see also NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 297-98 (7th Cir. 1992) (Fair Housing Act is applicable to allegations of racially discriminatory red-lining).

[FN5]. American Veterinary Medical Association, Task Force on Canine Aggression and Human-Canine Interactions, A Community Approach to Dog Bite Prevention, 218 J. Am. Veterinary Med. Ass'n 1732, 1733 (2001) [hereinafter Task Force].

[FN6]. See Richard Willing, Under Law, Pets Are Becoming Almost Human, USA Today, Sept. 13, 2000, at 1A.

[FN7]. Fred Bayles, Pit Bullterriers: Too Fierce to Live? Call for Ban Follow Maimings, Death, The Record, (N. N.J.), Dec. 30, 1985, at B16.

[FN8]. Id.

[FN9]. Id.

[FN10]. Id.

[FN11]. Id.

[FN12]. Garcia v. Vill. of Tijeras, 767 P.2d 355, 362 (N.M. Ct. App. 1988).

[FN13]. Bayles, supra note 7, at B16.

[FN14]. Id.

[FN15]. Bob Egelko, Appeal for Murder Rap in Dog-Maul Case / Attorney General Says Judge Had No Right to Let Knoller Off So Easy, S.F. Chron., Apr. 12, 2003, at A15.

[FN16]. Kenneth Phillips, Diane Whipple Case, at http:// www.dogbitelaw.com/PAGES/Whipple.html (last visited Jan. 8, 2004).

[FN17]. Karyn Grey, Note, Breed-Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems?, 27 Nova L. Rev. 415, 417 (2003) (describing a series of dog attacks in Florida); See Julie A. Thorne, Note, If Spot Bites the Neighbor, Should Dick and Jane Go to Jail?, 39 Syracuse L. Rev. 1445, 1445 (1988) (asserting that media attention fueled public outrage against Pit Bulls); See generally Jeffrey J. Sacks et al., Fatal Dog Attacks, 1989-1994, 97 Pediatrics 891 (June 1996) [hereinafter CDC 1989- 1994].

[FN18]. For a list of communities that have adopted or are considering BSL, see Jan Cooper, Breed Specific Legislation, at http://www.rott-n-chatter.com/rottweilers/laws/breedspecific.html (last visited June, 2004).

[FN19]. Id.

[FN20]. Ohio Rev. Code Ann. § 955.11(a)(1)(B)(4)(a)(iii) (West 2004).

[FN21]. Id. § 955.11. For a general discussion of Ohio's regulation of Pit Bulls, see Paula Lynn Wilson, Note, A.M. Sub. H.B. 352: An Overview-Dogs Under Control, 13 U. Dayton L. Rev. 297 (1988).

[FN22]. Ohio Rev. Code Ann. § 955.22(C) (West 2004).

[FN23]. Id. § 955.22(D)(2).

[FN24]. Id. § 955.22(E).

[FN25]. Denver, Colo., Rev. Mun. Code § 8-55(a) (2003). The ordinance provides several exceptions, including a grandfather clause, possession by animal shelters or humane societies, public exhibition, or transportation through the city. Id. § 8-55(c).

[FN26]. Id. § 8-55(b)(2). For an analysis of the problem of defining "Pit Bull," see infra notes 240-241 and accompanying text.

[FN27]. Id. § 8-52(a)(1).

[FN28]. Id. § 8-52(c)-(d).

[FN29]. Fla. Stat. Ann. § 767.14 (West 2003).

[FN30]. See Grey, supra note 17, at 418.

[FN31]. Minn. Stat. Ann. § 347.51(8) (West 2004).

[FN32]. See generally Russell G. Donaldson, Annotation, Validity and Construction of Statute, Ordinance or Regulation Applying to Specific Dog Breeds, Such as "Pit Bulls" or "Bull Terriers," 80 A.L.R. 4th 70 (2004). For discussion and background on challenges to BSL, see Thorne, supra note 17; Lynn Marmer, Comment, The New Breed of Municipal Dog Control Laws: Are They Constitutional?, 53 U. Cin. L. Rev. 1067 (1984); Heather K. Pratt, Comment, Canine Profiling: Does Breed-Specific Legislation Take a Bite Out of Canine Crime?, 108 Pa. St. L. Rev. 855 (2004).
  Cases in which courts have upheld the constitutionality of BSL include: Vanater v. Vill. of South Point, 717 F. Supp. 1236 (S.D. Ohio 1989); Colo. Dog Fanciers, Inc. v. City and County of Denver, 820 P.2d 644 (Colo. 1991) (en banc); State v. Peters, 534 So. 2d 760 (Fla. Dist. Ct. App. 1988); Hearn v. City of Overland Park, 772 P.2d 758, 766 (Kan. 1989); Garcia v. Vill. of Tijeras, 767 P.2d 355 (N.M. Ct. App. 1988); State v. Anderson, 566 N.E.2d 1224 (Ohio 1991); State v. Robinson, 541 N.E.2d 1092 (Ohio Ct. App. 1989); Am. Dog Owners Ass'n v. City of Yakima, 777 P.2d 1046 (Wash. 1989) (en banc).
  The Massachusetts Supreme Judicial Court, however, found a Pit Bull ban in Lynn, Massachusetts, to be unconstitutional. Am. Dog Owners Ass'n, Inc. v. City of Lynn, 533 N.E.2d 642, 646 (Mass. 1989).

[FN33]. U.S. Const. amend. V.

[FN34]. Sallyanne K. Sullivan, Banning the Pit Bull: Why Breed-Specific Legislation is Constitutional, 13 U. Dayton L. Rev. 279, 280-93 (1988).

[FN35]. See, e.g., Garcia, 767 P.2d at 358. Since dog ownership is not a "fundamental right," BSL need only meet the "rational relationship" test to be constitutional. Sullivan, supra note 34, at 281.

[FN36]. See, e.g., Garcia, 767 P.2d at 358-62.

[FN37]. See, e.g., id. at 361.

[FN38]. Id.

[FN39]. See, e.g., id. at 361-63.

[FN40]. See, e.g., Hearn v. City of Overland Park, 772 P.2d 758, 762-65 (Kan. 1989).

[FN41]. See, e.g., id.